

# Erroneous Deviation or Faithful Restoration? An Examination of the NLRB's *Browning-Ferris* Joint-Employer Standard

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## I. INTRODUCTION

Since the enactment of the National Labor Relations Act (NLRA),<sup>1</sup> the industrial and economic landscape in the United States has fundamentally transformed.<sup>2</sup> Gone are the days of simple, direct, and one-layered employment relationships. In their place, businesses have increasingly come to rely on a variety of “contingent work” arrangements,<sup>3</sup> including temporary workers, project workers, and subcontractors.<sup>4</sup> These flexible, nonstandard employment relationships are attractive to business owners and management for several reasons. Contingent workers are typically compensated at significantly lower rates than their traditional, more permanent counterparts.<sup>5</sup> Tax, employment, and labor statutes also incentivize businesses to develop arms-length employment relationships to avoid legal obligations and correlating expenses.<sup>6</sup>

The surge of contingent workers has been accompanied by a decline in union membership and the number of workers covered by labor and employment statutes.<sup>7</sup> Many statutes apply outdated standards that have not developed to address current American workplace realities, leaving many workers unprotected.<sup>8</sup> Because of this workplace transformation and the associated decline in job security and wage stability, many have urged administrative agencies such as the Department of Labor (DOL), Equal Employment Opportunity Commission (EEOC), and the National Labor

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\* J.D. Candidate, 2017, The Ohio State University Moritz College of Law. I would like to thank Professor Camille Hébert for her valuable feedback on previous drafts of this Note as well as the *Ohio State Law Journal* staff for the time and effort expended in bringing this Note to publication, especially Sara Skwierz. A special thanks also goes to my mother, Cindy Kortokrax, for her constant patience, love, and support.

<sup>1</sup> National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935), *amended by* Labor Management Relations (Taft–Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 401–531 (2012)). Subsequently, these enactments will collectively be referred to as the “NLRA.”

<sup>2</sup> See *Contingent Workers*, U.S. DEP’T LAB., [https://www.dol.gov/\\_sec/media/reports/dunlop/section5.htm](https://www.dol.gov/_sec/media/reports/dunlop/section5.htm) [<https://perma.cc/C2GR-EY3T>].

<sup>3</sup> *Id.*

<sup>4</sup> Charles Wilbanks, *Temp Work Raises Long-Term Questions for Economy*, CBS MONEYWATCH (Mar. 7, 2013), <http://www.cbsnews.com/news/temp-work-raises-long-term-questions-for-economy/> [<https://perma.cc/KF3E-BAU4>]. Although the data can vary depending on how “contingent work” is defined, recent Department of Labor “data suggest[s] that roughly a third, and perhaps up to 40 percent, of American workers are in part-time, contract or other non-standard jobs.” *Id.* Sources estimate that there will be up to 23 million contingent workers by 2017, up from about 17 million in 2013. *Id.*

<sup>5</sup> *Contingent Workers*, *supra* note 2.

<sup>6</sup> *Id.*

<sup>7</sup> Wilbanks, *supra* note 4.

<sup>8</sup> See *Contingent Workers*, *supra* note 2.

Relations Board (NLRB or Board) to update their policies to better effectuate the purposes of their founding statutes.<sup>9</sup>

Perhaps in response to these pressures, the NLRB recently reevaluated its thirty-year-old standard for determining whether a joint-employer relationship exists between employees and multiple putative employers.<sup>10</sup> The Board's prior standard required that a joint employer's control be "direct and immediate," rather than "limited and routine."<sup>11</sup> The putative joint employer was required to have actually exercised control over the employees at issue, rather than merely possessing the potential authority to exercise control over the employees.<sup>12</sup> In *Browning-Ferris*, the Board found that this standard "significantly and unjustifiably narrow[ed] the circumstances where a joint-employment relationship c[ould] be found."<sup>13</sup> Accordingly, the NLRB adopted a new, employee-friendly standard requiring a two-part determination: (1) whether an employment relationship exists under the common-law agency test and (2) "whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining."<sup>14</sup>

Central to the controversy surrounding *Browning-Ferris*, the NLRB's new standard requires only that an employer *possess* authority to control the terms and conditions of workers' employment; the NLRB will no longer require that

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<sup>9</sup> See, e.g., Michael C. Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 B.C. L. REV. 329, 346 (1998) ("The use of employee leasing agencies and the subcontracting of supervisory authority over workers has made vulnerable an increasing number of American workers to the denial of the core promise of the NLRA."); *Contingent Workers*, *supra* note 2 ("The definition of employee in labor, employment, and tax law should be modernized, simplified, and standardized. . . . Congress and the NLRB should remove the incentives that now exist for firms to use variations in corporate form to avoid responsibility for the people who do their work.").

<sup>10</sup> *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. No. 186, 2015 WL 5047768, at \*1 (Aug. 27, 2015). A petition challenging this decision has been filed in the D.C. Circuit. See Brief of Petitioner/Cross Respondent 10–13, *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, Nos. 16-1028, 16-1063, 16-1064 (D.C. Cir. June 7, 2016) (summary of petitioner's argument). Oral arguments were held as this Note was prepared for publication. For a discussion, see Vin Gurrieri, *NLRB's Joint Employer Test Comes Under Fire at DC Circ.*, LAW360 (Mar. 9, 2017), [https://www.law360.com/employment/articles/899890/nlrbs-joint-employer-test-comes-under-fire-at-dc-circ-?nl\\_pk=4dc47758-78cc-425a-96f6-ad13961fe9c9&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=employment](https://www.law360.com/employment/articles/899890/nlrbs-joint-employer-test-comes-under-fire-at-dc-circ-?nl_pk=4dc47758-78cc-425a-96f6-ad13961fe9c9&utm_source=newsletter&utm_medium=email&utm_campaign=employment) [<https://perma.cc/GK5P-NV3J>].

<sup>11</sup> *Browning-Ferris*, 2015 WL 5047768, at \*17; see also, e.g., *TLI, Inc.*, 271 N.L.R.B. 798, 799 (1984), *overruled by Browning-Ferris*, 2015 WL 5047768; *Laerco Transp.*, 269 N.L.R.B. 324, 326 (1984), *overruled by Browning-Ferris*, 2015 WL 5047768.

<sup>12</sup> *Browning-Ferris*, 2015 WL 5047768, at \*2.

<sup>13</sup> *Id.* The NLRB's goal in revisiting its joint-employer standard was to better address developing issues in the current economy and to better effectuate the purposes of the NLRA. *Id.*

<sup>14</sup> *Id.*

a putative joint employer actually exercise any authority over workers.<sup>15</sup> Because both direct and indirect employer-control satisfy the new standard,<sup>16</sup> the circumstances under which the Board could find a joint-employer relationship has substantially increased.<sup>17</sup>

The dissenting NLRB members vigorously opposed the majority's departure from long-established Board precedent, contending that the new standard extends "far beyond" the power Congress delegated to the Board under the NLRA and Taft-Hartley amendments.<sup>18</sup> The dissent also highlighted concerns about the significant implications the new standard might have on the economy and business labor policies.<sup>19</sup>

The dissenting NLRB members were not alone in their concerns. The business and legal community have vigorously opposed the NLRB's new standard, arguing that "it w[ill] force companies to the bargaining table . . . [who] have little say over working conditions," resulting in increased instability and uncertainty in employment and business relationships.<sup>20</sup> Companies might "find themselves dragged into labor disputes" despite the fact that the company reasonably believed it had freed itself from collective-bargaining obligations by entering into an arms-length contract with an outside employment firm.<sup>21</sup> Business organizations are criticizing the decision as "another case of unwarranted government overreach that could stifle [economic] growth"<sup>22</sup> and have a "devastating economic impact."<sup>23</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See Daniel Fisher, *Controversial NLRB Ruling Could End Contract Employment As We Know It*, FORBES (Aug. 27, 2015), <http://www.forbes.com/sites/danielfisher/2015/08/27/nlrb-declares-browning-ferris-a-joint-employer-whos-next/> [https://perma.cc/8PM7-ABHW]. In support of its *Browning-Ferris* decision, the NLRB cited its "responsibility to adapt the [NLRA] to the changing patterns of industrial life." *Browning-Ferris*, 2015 WL 5047768, at \*15 (quoting *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975)).

<sup>18</sup> *Browning-Ferris*, 2015 WL 5047768, at \*25 (Members Miscimarra & Johnson, dissenting). The dissent argued that the new standard departs from well-established common law principles of agency that both precedent and the legislative history of the NLRA require the Board follow when assessing employment relationships. *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Daniel Wiessner, *Companies Liable for Labor Violations by Franchisees, U.S. Labor Board Says*, WESTLAW J. EMP., Sept. 15, 2015, at \*1, \*1 ("The NLRB has totally upset the apple cart with respect to an understanding over accepted business risk . . . ." (quoting Michael Lotito, attorney, Littler Mendelson)); see also Fisher, *supra* note 17.

<sup>21</sup> Fisher, *supra* note 17.

<sup>22</sup> Cole Stangler, *NLRB's New Joint Employer Standard: Everything You Wanted to Know but Were Afraid to Ask*, INT'L BUS. TIMES (Aug. 31, 2015), <http://www.ibtimes.com/nlrbs-new-joint-employer-standard-everything-you-wanted-know-were-afraid-ask-2075896> [https://perma.cc/3FEJ-DVT9].

<sup>23</sup> Dave Jamieson, *The Labor Ruling McDonald's Has Been Dreading Just Became a Reality*, HUFFINGTON POST (quoting Competitive Enterprise Institute, a libertarian think tank), <http://www.huffingtonpost.com/entry/the-federal-ruling-mcdonalds-has-dreaded->

The NLRB's *Browning-Ferris* decision has also ignited strong support from the labor community and union-supporters, which are praising the decision as an appropriate response to a quickly evolving economic and employment landscape.<sup>24</sup> Supporters maintain that the new standard could make it "easier for unions and workers to win higher wages and better working conditions,"<sup>25</sup> restoring corporate responsibility and worker rights in a "'fissured' economy."<sup>26</sup>

Concerned parties on both sides of the debate have recognized the significant issues raised by the potential impact of the NLRB's new joint-employer standard.<sup>27</sup> Because other administrative agencies typically afford NLRB decisions some deference, the NLRB's departure from its thirty-year-old standard will likely also encourage developments in other areas of the law.<sup>28</sup> Considering the substantial impact *Browning-Ferris* might have on the legal, business, and labor communities, commentators have contended that now might be an appropriate time for courts to rein in the NLRB with respect to its expansive exercise of rulemaking authority.<sup>29</sup>

Despite these concerns, this Note argues that courts should defer to the NLRB's *Browning-Ferris* joint-employer decision because Congress has delegated rulemaking authority to the NLRB that allows the Board some discretion in making employment relationship determinations. The standard is also consistent with common law principles of agency and effectuates the established purposes of the NLRA. In Part II, this Note will review *Browning-Ferris*, analyzing the legal and policy considerations articulated by the majority and dissenting NLRB members. Next, Part III will examine the standard of review courts traditionally employ when reviewing NLRB

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<sup>24</sup> Stangler, *supra* note 22.

<sup>25</sup> Wiessner, *supra* note 20, at \*1.

<sup>26</sup> Jamieson, *supra* note 23. Other sources also argue that the new joint-employer standard might insulate franchises and smaller companies from liability for labor law violations that are the result of corporate policies rather than local decisions, increasing corporate responsibility. See Wiessner, *supra* note 20, at \*2.

<sup>27</sup> See Ben James, *4 Things to Know About the NLRB's Joint-Employer Decision*, LAW360 (Aug. 28, 2015), <https://www.law360.com/employment/articles/696698/4-things-to-know-about-the-nlrbs-joint-employer-decision> [https://perma.cc/3BPV-BNL5].

<sup>28</sup> Perhaps of greatest concern is the impact *Browning-Ferris* might have on decisionmaking at the EEOC, potentially increasing employer liability under a wide range of employment statutes, including Title VII. See Gerald L. Maatman, Jr. et al., *Jumping for Joint Employer: The EEOC Files Amicus Brief Supporting Broadened Definition of Joint Employer in High-Profile NLRB Litigation*, SEYFARTH SHAW: WORKPLACE CLASS ACTION BLOG (Sept. 21, 2016), <http://www.workplaceclassaction.com/2016/09/jumping-for-joint-employer-the-eeoc-files-amicus-brief-supporting-broadened-definition-of-joint-employer-in-high-profile-nlrbs-litigation/> [https://perma.cc/K9QM-C8C9].

<sup>29</sup> James, *supra* note 27 ("We know the courts have sometimes reined in the agency, and this could be one of those times." (quoting Steven Bernstein, partner, Fisher & Phillips LLP)).

decisions, including an assessment of when *Chevron* deference applies to NLRB decisions. Then, Part IV will analyze whether the NLRA's purpose and legislative history provide any ambiguity as to what standard the NLRB must apply when assessing joint-employment status. Finally, Part V will argue that courts should defer to the Board's decision because it is faithful to the purposes of the NLRA and reasonably consistent with the general common law of agency.

## II. THE *BROWNING-FERRIS* DECISION: PROPOSED POLICY AND LEGAL SUPPORT

In *Browning-Ferris*, the NLRB reevaluated its thirty-year-old joint-employer standard.<sup>30</sup> After re-evaluating the NLRA's purposes and traditional NLRB practices, the majority ultimately reconstructed its standard for determining joint-employment relationships.<sup>31</sup> The majority expanded its standard to include those employers who merely possess indirect or unexercised control, as long as the employer "possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining."<sup>32</sup> The dissent opposed this departure from Board precedent, finding that the majority's new standard overstepped the Board's rulemaking authority because it was not based on the common law of agency, but rather the members' own policy agenda.<sup>33</sup>

### A. *The Facts of the Case*

Browning-Ferris Industries of California (BFI) owns and operates the Newby Island recycling facility.<sup>34</sup> BFI is the sole employer of approximately sixty employees, most of whom work outside of the Newby Island recycling facility where they prepare materials that will be sorted inside the facility.<sup>35</sup> Once the materials are transported inside, workers provided by a staffing agency, Leadpoint, sort the materials and clean the facility.<sup>36</sup> The relationship between BFI and the contingent workforce provided by Leadpoint is controlled by a temporary labor services agreement (Agreement).<sup>37</sup> The Agreement explicitly states that "Leadpoint is the sole employer of the personnel it supplies" BFI and that "nothing in the Agreement shall be construed as creating an employment relationship between BFI and the

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<sup>30</sup> *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. No. 186, 2015 WL 5047768, at \*1–2 (Aug. 27, 2015).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at \*2.

<sup>33</sup> *Id.* at \*25 (Members Miscimarra & Johnson, dissenting).

<sup>34</sup> *Id.* at \*3 (majority opinion).

<sup>35</sup> *Id.*

<sup>36</sup> *Browning-Ferris*, 2015 WL 5047768, at \*3.

<sup>37</sup> *Id.*

personnel that Leadpoint supplies.”<sup>38</sup> The Agreement also sets forth the terms and conditions of the relationship between BFI and the personnel provided by Leadpoint, including the management structure; hiring, discipline, and termination procedures; wages and benefits; the setting of personnel hours and schedule; the actual work performed; and training and safety requirements.<sup>39</sup>

When the same union representing the sole employees of BFI filed a petition to also represent the Leadpoint employees in their bargaining with BFI, the Regional NLRB Director issued a Decision and Direction of Election finding that BFI was *not* a joint employer of the Leadpoint personnel working in the BFI facility.<sup>40</sup> The union filed for NLRB review of this decision, contending that the terms as well as the realities of the relationship between Leadpoint and BFI were that of a joint-employment relationship under the Board’s standard.<sup>41</sup> If not, the union argued, the NLRB should reconsider its standard for determining joint-employer relationships.<sup>42</sup> The NLRB accepted this invitation.

### *B. The NLRB Announces a New Joint-Employer Standard*

Under the Board’s previous, thirty-year-old standard, a joint employer’s control over employees was required to be “direct and immediate, not ‘limited and routine.’”<sup>43</sup> The previous standard required that in order to “affect[] the terms and conditions of employment to such a degree [as to] be deemed a joint employer,”<sup>44</sup> a putative joint employer must actually exercise control over the

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<sup>38</sup> *Id.*

<sup>39</sup> Of particular importance, the Agreement reserved the following authority to BFI: (1) although Leadpoint “recruit[s], interview[s], test[s], select[s], and hire[s]” the personnel contracted to complete the work for BFI, BFI retains the right to request that the Leadpoint personnel “meet or exceed” BFI’s “standard selection procedures and tests” before being hired by Leadpoint; (2) although Leadpoint has “sole responsibility to counsel, discipline, review, evaluate, and terminate” personnel assigned to the BFI location, BFI retains the authority to “reject” and “discontinue the use” of any Leadpoint personnel “for any or no reason,” and there have been several incidents where Leadpoint personnel’s discipline was a result of BFI action; (3) Leadpoint may not pay its personnel a rate greater than BFI pays its similarly situated employees without BFI’s explicit approval; (4) although Leadpoint “alone schedules which employees will work each shift,” the Agreement does not allocate Leadpoint any control over what the actual shift schedule will be or the facility’s working hours; (5) during daily supervisor meetings, BFI supervisors instruct which material streams will operate during the following shift and “establish the work priorities” of each shift, and to achieve these priorities, BFI, and BFI alone, may control and make various adjustments to the speed of the streams; and (6) if BFI managers observe issues with Leadpoint personnel productivity, the managers are to report it to the Leadpoint supervisors who are “expected to address those issues with the employees.” *Id.* at \*3–9.

<sup>40</sup> *Id.* at \*1, \*8.

<sup>41</sup> *Id.* at \*1, \*9.

<sup>42</sup> *Browning-Ferris*, 2015 WL 5047768, at \*10.

<sup>43</sup> *Id.* at \*17.

<sup>44</sup> *Id.* at \*14 (quoting *TLI, Inc.*, 271 N.L.R.B. 798, 799 (1984)).

workers at issue, and not merely contractually reserve authority to do so.<sup>45</sup> Thus, contractual provisions granting a company the potential authority to control a workforce's terms and conditions of employment were insufficiently "direct and immediate" to establish joint-employer status unless the putative employer actually exercised the reserved authority.<sup>46</sup>

The Board's refusal to recognize indirect exercises of control allowed putative joint employers to escape collective-bargaining and other employer obligations even if the putative employer had "exercised control that significantly affected employees' terms and conditions of employment."<sup>47</sup> The circumstances under which the NLRB could find a joint-employment relationship were further restricted by the standard's exception for putative joint employers who exercised only "limited and routine" control.<sup>48</sup>

After analyzing NLRB precedent, the NLRA's language, and the NLRA's underlying policies,<sup>49</sup> the Board found that its standard "significantly and unjustifiably narrow[ed] the circumstances where a joint-employment relationship c[ould] be found."<sup>50</sup> Thus, the NLRB revisited its standard in order to better effectuate the NLRA's purposes in the current, rapidly evolving economic environment.<sup>51</sup> Specifically, the Board was concerned about the rapid growth of contingent employment relationships<sup>52</sup>—in many instances,

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<sup>45</sup> *Id.*

<sup>46</sup> *See id.* (quoting *Airborne Express*, 338 N.L.R.B. 597, 597 n.1 (2002)).

<sup>47</sup> *Id.*

<sup>48</sup> *Browning-Ferris*, 2015 WL 5047768, at \*14. For instance, in *TLI, Inc.*, the Board found that a putative joint employer only exercised "limited and routine" control over drivers even though it had taken the following actions: commanded drivers as to which deliveries were to be made on any given day, filed incident reports with the supplier employer (or staffing agency) when drivers engaged in conduct adverse to the putative joint employer's operations, received accident reports, and maintained driver logs and records. *TLI, Inc.*, 271 N.L.R.B. at 799.

<sup>49</sup> *Browning-Ferris*, 2015 WL 5047768, at \*1 (stating that the Board added additional requirements to establishing joint-employer status without explanation and that had "no clear basis" in the cited precedent or "in the text or policies of the [NLRA]"); *see, e.g.*, *Value Village*, 161 N.L.R.B. 603, 607 (1966) ("[T]he power to control is present by virtue of the operating agreement, whether or not exercised . . ."). Thus, as the NLRB explained in *Browning-Ferris*, prior NLRB decisions establish that the right to control employees traditionally had some probative value whether or not the putative joint employer actually exercised its reserved authority. *Browning-Ferris*, 2015 WL 5047768, at \*12.

<sup>50</sup> *Browning-Ferris*, 2015 WL 5047768, at \*2.

<sup>51</sup> *Id.* at \*1.

<sup>52</sup> *Id.* at \*11 (noting that in these contingent employment relationships, "the user firm can influence the supplier firm's bargaining posture by threatening to terminate its contract with the supplier if wages and benefits rise above a set cost threshold"). In 2005, contingent employees accounted for as much as 4.1% of all employees, or 5.7 million workers. Press Release, U.S. Dep't of Labor, Contingent and Alternative Employment Arrangements, February 2005 (July 27, 2005), <http://www.bls.gov/news.release/pdf/conemp.pdf> [<https://perma.cc/CX3C-SEDC>]. Since that time, the number of contingent employment relationships has continued to grow. *See Browning-Ferris*, 2015 WL 5047768, at \*11.



these arrangements seemed to be created by companies primarily to avoid labor law liability and other employer responsibilities.<sup>53</sup> The Board found this development “reason enough” to revisit its joint-employer standard as “[t]he primary function and responsibility of the Board . . . is that ‘of applying the general provisions of the [NLRA] to the complexities of industrial life.’”<sup>54</sup>

In order to more faithfully promote the purposes of the NLRA and common law agency principles,<sup>55</sup> the NLRB adopted a new, two-step joint-employer standard. The NLRB’s new standard requires that in order to qualify as a joint employer, the Board must determine that (1) an employment relationship exists under the common law agency test,<sup>56</sup> and (2) “the putative joint employer possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful collective bargaining.”<sup>57</sup>

The Board argued that this standard is consistent with the common law of agency because it “properly considers the existence, extent, and object of the putative joint employer’s control.”<sup>58</sup> However, central to the controversy surrounding *Browning-Ferris*, the NLRB’s new standard will no longer require that a joint employer actually exercise control over the employees at issue, finding that this requirement was Board-created and inconsistent with the common law of agency.<sup>59</sup> A putative joint employer may satisfy the new standard if it merely “possess[es] the authority to control [the] employees’ terms and conditions of employment,”<sup>60</sup> and even if action is taken indirectly, “through an intermediary.”<sup>61</sup>

Under its new joint-employer standard, the NLRB found that BFI and Leadpoint were, in fact, joint employers of the personnel provided by

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<sup>53</sup> See *Browning-Ferris*, 2015 WL 5047768, at \*15.

<sup>54</sup> *Id.* (omission in original) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979)).

<sup>55</sup> *Id.* at \*2 (“Our aim today is to put the Board’s joint-employer standard on a clearer and stronger analytical foundation, and, within the limits set out by the [NLRA], to best serve the Federal policy of ‘encouraging the practice and procedure of collective bargaining.’” (quoting 29 U.S.C. § 151 (2012))).

<sup>56</sup> The Board must determine whether the putative joint employers “share or codetermine those matters governing the essential terms and conditions of employment.” *Id.* (quoting *NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982)). However, the Board noted that “the existence of a common-law employment relationship is necessary, but not [necessarily] sufficient, to find joint-employer status.” *Id.* at \*16. The putative joint employer must also satisfy the second prong before qualifying as a joint employer under the new standard. See *id.*

<sup>57</sup> *Id.* at \*2; see also *id.* at \*16 (“To best promote this policy, our joint-employer standard—to the extent permitted by the common law—should encompass the full range of employment relationships wherein meaningful collective bargaining is, in fact, possible.”).

<sup>58</sup> *Id.*

<sup>59</sup> *Browning-Ferris*, 2015 WL 5047768, at \*17.

<sup>60</sup> *Id.* at \*2 (“Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry.”).

<sup>61</sup> *Id.*

Leadpoint.<sup>62</sup> The Board determined that BFI qualified as an employer under common law standards because it has both the right to control the Leadpoint personnel and has actually exercised this control, both directly and indirectly.<sup>63</sup> BFI's relationship with the Leadpoint personnel also satisfied the second prong of the Board's new joint-employer standard: Leadpoint and BFI "share[] or codetermine[] those matters governing the essential terms and conditions of employment for the Leadpoint employees."<sup>64</sup> Thus, BFI's presence at the bargaining table would permit, and even encourage, more meaningful collective bargaining.<sup>65</sup>

Although the majority indicated that the employment relationship at issue likely would have satisfied the Board's prior standard as well, the members recognized that its new joint-employer standard might raise concerns.<sup>66</sup> However, the majority maintained that "reevaluating doctrines, refining legal rules, and sometimes reversing precedent are familiar parts of the Board's work"<sup>67</sup> and part of the nature of administrative decisionmaking.<sup>68</sup> The majority categorized many of the anticipated implications of its decisions as "law-school-exam hypothetical[s] of doomsday scenarios" that likely over-exaggerate the business and economic consequences of requiring multiple employers to join together at the collective-bargaining table.<sup>69</sup>

### *C. The Dissent: An Impermissible Departure from Common Law Principles*

The dissenting Board members rejected the majority's argument that broadening the joint-employer standard was necessary due to developments in the labor market.<sup>70</sup> The dissent argued that Congress was aware of contingent and arms-length business relationships at the time the NLRA was enacted in

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<sup>62</sup> *Id.* at \*3.

<sup>63</sup> *Id.* at \*22 (describing BFI's right to control the Leadpoint employees as "indisputable").

<sup>64</sup> *Id.* The Board based its decisions on the fact that BFI retains "significant control" over who Leadpoint could hire to work at its facility, reserves an "unqualified right" to discontinue any employee assigned to its facilities by Leadpoint for any reason, exercises control over "the processes that shape day-to-day work" of the Leadpoint employees (unilaterally controlling several factors), dictates many aspects of the Leadpoint employees' schedules and tasks, and plays a significant role in determining the wages of these employees by preventing Leadpoint from paying them more than BFI employees performing similar work. *Id.* at \*22–24.

<sup>65</sup> After this decision, BFI refused to bargain with its joint employees and recently appealed the Board's decision to the Court of Appeals for the District of Columbia Circuit. See Brief of Petitioner/Cross Respondent, *supra* note 10, at 1–2.

<sup>66</sup> See *Browning-Ferris*, 2015 WL 5047768, at \*24.

<sup>67</sup> *Id.* (quoting UGL-UNICCO Serv. Co., 357 N.L.R.B. 801, 804 (2011)).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at \*25 (Members Miscimarra & Johnson, dissenting).

1935, as well as when it was amended in 1947; however, Congress chose to limit bargaining obligations to common law employers.<sup>71</sup> The dissent contended that the Board's new standard essentially returns to the "more expansive policy-based economic realities" test expressly rejected by Congress through the Taft–Hartley amendments.<sup>72</sup> Thus, the dissent concluded that the majority's new standard exceeds the power delegated to the Board by Congress<sup>73</sup> by departing from the common law of agency standard for determining employment relationships—a standard that precedent and legislative history establish the Board must follow.<sup>74</sup>

The dissent argued that the Board's new standard is not based in agency law at all, but rather forwards a policy agenda to equalize bargaining power between employers and employees.<sup>75</sup> Although the dissenting Board members recognized that the Board is allowed some movement and independence in determining joint-employment relationships, they found that the majority members failed to fit their sudden departure from established precedent into the controlling statutory framework or to adequately explain why such a departure was necessary.<sup>76</sup>

The dissent also took issue with the "dramatic implications" that the majority's new standard will have on the economy—impacts that the affected businesses would have no reason to predict or plan for.<sup>77</sup> Further, the dissenting members alleged that the Board's new joint-employer standard will actually *destabilize* collective-bargaining relationships by forcing too many parties with divided interests to the same bargaining table.<sup>78</sup> In any case, the

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<sup>71</sup> *Id.* ("Many forms of subcontracting, outsourcing, and temporary or contingent employment date back to long before the 1935 passage of the Act. Congress was obviously aware of the existence of third-party intermediary business relationships in 1935. . . . [I]t is the inescapable conclusion that follows from Supreme Court precedent recognizing that the Act did not confer 'employer' status on third parties merely because commercial relationships made them interdependent with an 'employer' and its employees.").

<sup>72</sup> *Browning-Ferris*, 2015 WL 5047768, pt. III.A (Members Miscimarra & Johnson, dissenting); see also 29 U.S.C. §§ 401–531 (2012).

<sup>73</sup> See *Browning-Ferris*, 2015 WL 5047768, at \*25 (Members Miscimarra & Johnson, dissenting) (arguing that the Board is merely to act as a "referee" of the collective bargaining process, and is "certainly not vested with general authority to define national economic policy by balancing the competing interests of different business enterprises").

<sup>74</sup> *Id.* (citing *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 260 (1968)).

<sup>75</sup> *Id.* pt. VII.

<sup>76</sup> *Id.* pt. II.

<sup>77</sup> *Id.* at \*25.

<sup>78</sup> *Id.* pt. V.A (describing the Majority's new standard as "near-limitless," as it could potentially encompass and impact almost every business relationship). The dissenting NLRB members took specific concern with the idea that under the majority's new joint-employer standard, franchisors might be considered joint employers with their franchisees. *Id.* pt. V.D. Because of the unique structure of franchising arrangements, in many cases the right to control reserved by the franchisor in the franchise agreement "has nothing to do with labor policy," but is instead due to statutory requirements to maintain trademark

dissent argued that the joint-employer standard is a “determination of pure agency law involv[ing] no special administrative expertise that a court does not possess.”<sup>79</sup> Therefore, the dissent seemed to conclude that the “‘potentially massive’ economic implications” of the Board’s decision, as well as its unexplained departure from established precedent, might provide courts grounds to overturn or depart from the Board’s new standard.<sup>80</sup>

### III. TRADITIONAL JUDICIAL REVIEW OF NLRB DECISIONS

Typically, when courts review NLRB decisions or rulemaking actions, such as that exercised in *Browning-Ferris*, courts will allocate deference to the Board’s action in a manner consistent with *Chevron U.S.A., Inc. v. Natural Resources Defense Council* and its progeny.<sup>81</sup> However, in certain circumstances, courts have been more reluctant to blindly defer to Board action without considering the deeper policy implications of the action.<sup>82</sup> This Part will first discuss the standard courts typically apply when analyzing an administrative agency’s interpretation or application of a statute and will then examine situations where courts have more readily departed from this standard.

#### A. *The Development of the Chevron Deference Doctrine*

In *Chevron*, the Supreme Court adopted a two-part test for determining whether a court should defer to an administrative agency’s interpretation of a statute.<sup>83</sup> First, a court must analyze whether Congress has “directly spoken to

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protection as well as the franchisor’s rational business interest in protecting the quality of their brand. *Id.*

<sup>79</sup> *Browning-Ferris*, 2015 WL 5047768, at \*25 (Members Miscimarra & Johnson, dissenting) (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 260 (1968)) (“[C]ourts have afforded the Board deference in this context merely as to the Board’s ability to make factual distinctions when applying the common-law agency standard. However, our colleagues mistakenly interpret this as a *grant of authority to modify the agency standard itself*. This type of change is clearly within the province of Congress, not the Board.” (footnote omitted)).

<sup>80</sup> *See id.* pt. VII (quoting *Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012)).

<sup>81</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); *see, e.g., Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992) (“Like other administrative agencies, the NLRB is entitled to judicial deference when it interprets an ambiguous provision of a statute that it administers.”). However, it is worth noting that there has also been a significant push to abandon the *Chevron* doctrine. *See* Juan Carlos Rodriguez, *GOP Push to ‘Repeal’ Chevron Deference May Come Up Short*, LAW360 (Jan. 5, 2017), <https://www.law360.com/articles/877708/gop-push-to-repeal-chevron-deference-may-come-up-short> [<https://perma.cc/M8J6-WC3T>].

<sup>82</sup> *See* discussion *infra* Part III.B.

<sup>83</sup> *Chevron*, 467 U.S. at 842–43.

the precise question at issue” through the statute being administered,<sup>84</sup> or if the statute is ambiguous as to the question at-hand. Second, if the court finds the statute to be ambiguous, the court must then determine whether the agency’s interpretation is reasonable or permissible within the statutory framework.<sup>85</sup> In *Chevron*, the Supreme Court recognized that Congress might delegate authority to an administrative agency explicitly or implicitly through its silence or ambiguity.<sup>86</sup> In either case, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”<sup>87</sup> The Court justified congressional deference to an agency’s reasonable interpretation of a statute based on the agency’s greater expertise and experience.<sup>88</sup> Thus, the Court stated that courts should not disturb an agency’s reasonable interpretation of a statute “unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.”<sup>89</sup>

The Supreme Court has issued several opinions since *Chevron* further defining the appropriate scope of judicial review of administrative agency action. In *United States v. Mead Corp.*, the Court introduced a possible “Step Zero” to the *Chevron* deference doctrine.<sup>90</sup> At this step, prior to deciding whether the delegating statute is ambiguous, courts must first analyze whether *Chevron* deference is warranted at all based on the type and extent of authority the statute delegates to the agency.<sup>91</sup> *Chevron* deference to an administrative agency’s action is only warranted “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”<sup>92</sup>

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<sup>84</sup> *Id.* at 842. Here, the NLRA is the statute being administered. More specifically, the issue being addressed is the meaning of “joint employer” under the NLRA. Because the NLRA does not explicitly define “joint employer,” this standard has traditionally been tied to the Board’s standard for determining whether an entity is an “employer.” See *Browning-Ferris*, 2015 WL 5047768, at \*15. See 29 U.S.C. § 152(2) (2012), for the NLRA’s broad definition of “employer.”

<sup>85</sup> *Chevron*, 467 U.S. at 843.

<sup>86</sup> *Id.* at 842–44.

<sup>87</sup> *Id.* at 844.

<sup>88</sup> *Id.* (recognizing that the Court has consistently deferred to agency interpretations “whenever [a] decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding . . . in the given situation . . . depend[s] upon more than ordinary knowledge respecting the matters subjected to agency regulations” (quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961))).

<sup>89</sup> *Id.* at 845 (quoting *Shimer*, 367 U.S. at 383).

<sup>90</sup> *United States v. Mead Corp.*, 533 U.S. 218, 227–31 (2001).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 226–27 (explaining that an administrative agency can establish that Congress delegated authority intended to have the force of law “in a variety of ways,” including “an agency’s power to engage in adjudication or notice-and-comment rulemaking”).

The Court's *Mead* decision explains that agencies "make all sorts of interpretive choices, and . . . not all of those choices bind judges to follow them."<sup>93</sup> However, even interpretative choices that do not merit *Chevron*-level deference might still influence court decisions regarding a related matter.<sup>94</sup> Thus, *Mead* establishes that a court's deference to an agency's action varies with the circumstances.<sup>95</sup> Therefore, when determining the level of deference to afford an agency action, courts should consider, among other factors, "the degree of the agency's care, its consistency," the "formality" of the process followed in creating the rule, the agency's "relative expertness," and "the persuasiveness of the agency's position."<sup>96</sup>

In *National Cable & Telecommunications Association v. Brand X Internet Services*, the Court extended the situations in which courts may extend *Chevron* deference to administrative agencies' statutory interpretations.<sup>97</sup> The Court held that a court's interpretation of a statute will not trump an agency's otherwise permissible interpretation, unless the court holds that the controlling statute is "unambiguous" and "leaves no room for agency discretion."<sup>98</sup> Perhaps more importantly when considering the issue presented by *Browning-Ferris*, the *Brand X* Court further explained that "[a]gency inconsistency is *not* a basis for declining to analyze the agency's interpretation under the *Chevron* framework."<sup>99</sup> As the Court explained, when an agency interprets a statute, the agency must choose between several interpretations and continuously reconsider the wisdom of its interpretative policy.<sup>100</sup> The "wisdom" of any

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<sup>93</sup> *Id.* at 227.

<sup>94</sup> *See id.* at 227–28; *see also, e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

<sup>95</sup> *Mead*, 533 U.S. at 228 ("The approach has produced a spectrum of judicial responses, from great respect at one end, to near indifference at the other." (citations omitted)).

<sup>96</sup> *Id.* (footnote omitted). The Court's *Mead* analysis indicates that if an agency is inconsistent, only follows informal rulemaking procedures, or the rule addresses a subject over which the agency has no special expertise, courts may elect to extend something similar to *Skidmore* "weight" rather than *Chevron* deference. *See id.*; *see also Skidmore*, 323 U.S. at 139–40.

<sup>97</sup> The synthesized rule under *Chevron* and *Mead* is that a court should defer to an agency's interpretation of a statute if it determines that Congress delegated the agency rulemaking authority, the statute delegating the authority is ambiguous as to the precise question at issue, and the agency's interpretation is reasonably within the ambiguity and statutory structure. *Mead*, 533 U.S. at 227–31; *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984).

<sup>98</sup> *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("This principle follows from *Chevron* itself.").

<sup>99</sup> *Id.* at 981 (emphasis added).

<sup>100</sup> *Id.* ("An initial agency interpretation is not instantly carved in stone." (quoting *Chevron*, 467 U.S. at 863)).

particular statutory interpretation logically depends on circumstances such as changes in the surrounding legal, economic, and political landscape.<sup>101</sup>

However, in *Brand X* the Court did indicate that an agency's inconsistent interpretation of a statute, or unexplained departure from prior precedent, may be grounds for finding a new interpretation to be "arbitrary and capricious" under the Administrative Procedure Act (APA).<sup>102</sup> Scholars have interpreted this language as a clear indicator that judicial review of agency decisions should include review for arbitrary or capricious action in addition to the conditions necessary to qualify for *Chevron* deference.<sup>103</sup> Courts have applied this review for arbitrariness as part of *Chevron*'s "Step Two" analysis for reasonability, or as a separate, supplementary step.<sup>104</sup> An agency interpretation or rule is considered arbitrary or capricious if

the agency . . . relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>105</sup>

This understanding of judicial review of agency action is especially relevant when considering the language of the NLRA. Congress delegates to the NLRB the authority to make and amend rules and regulations "in the manner prescribed by" the APA.<sup>106</sup> Courts have interpreted this language to

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<sup>101</sup> See *id.* (quoting *Chevron*, 467 U.S. at 863–64). As the *Brand X* Court recognized, "the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Id.* (quoting *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 742 (1996)).

<sup>102</sup> *Id.* ("Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act."); see also Administrative Procedure Act, 5 U.S.C. § 706(2) (2012) (stating that the reviewing court shall "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations").

<sup>103</sup> For example, Michael C. Harper has stated:

After *Brand X*, it thus should be clear to courts, if it was not clear before, that their review of agency formulations of legal doctrine should include the serious arbitrary or capricious review delineated in decisions like *State Farm*. This is true even in cases where the agency formulations are embodied in statutory constructions for which *Chevron* deference is claimed.

Michael C. Harper, *Judicial Control of the National Labor Relations Board's Lawmaking in the Age of Chevron and Brand X*, 89 B.U. L. REV. 189, 210 (2009).

<sup>104</sup> *Id.*

<sup>105</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>106</sup> 29 U.S.C. § 156 (2012).

mean that Congress has delegated the Board broad discretion to exercise its rulemaking authority to the fullest extent possible under the APA.<sup>107</sup> Had Congress intended to limit the Board's authority, it would have done so either in the NLRA's text or legislative history.<sup>108</sup> Thus, the Board is generally allowed reasonable space to adjust its rules and regulations, including its interpretation of "employee" and "employer."<sup>109</sup> As stated in *NLRB v. Town & Country Electric, Inc.*, the Board's construction of these terms "is entitled to considerable deference."<sup>110</sup>

### B. *Limits of Chevron Deference to the NLRB*

Although courts reviewing the NLRB's action typically apply the analysis laid out in the previous Part, there are instances in which courts have more readily declined to defer to the Board. Many of these situations could be properly categorized as falling under *Chevron* Step Zero.<sup>111</sup> Courts have more frequently declined to extend full *Chevron* deference to Board rules and regulations based on several factors: the NLRB's degree of care or formality in enacting a regulation, its consistency, its relative expertise, and the persuasiveness of the Board's position.<sup>112</sup>

Courts have declined to defer to Board action based on the Board's lack of expertise if it is "neither a case where the agency is in a better position to find facts, nor a situation where the NLRB's expertise in labor relations or its special role as a primary source of national labor policy serves as a basis for

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<sup>107</sup> See, e.g., *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 613 (1991).

<sup>108</sup> *Id.* ("As a matter of statutory drafting, if Congress had intended to curtail in a particular area the broad rulemaking authority granted in § 6, we would have expected it to do so in language expressly describing an exception from that section or at least referring specifically to the section.").

<sup>109</sup> See, e.g., *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995).

<sup>110</sup> *Id.* ("[W]hen reviewing the Board's interpretation of the term 'employee' as it is used in the Act, we have repeatedly said that '[s]ince the task of defining the term 'employee' is one that 'has been assigned primarily to the agency created by Congress to administer the Act,' . . . the Board's construction of that term is entitled to considerable deference . . . ." (second alteration and omissions in original) (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984))). But see *FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1127–28 (D.C. Cir. 2017).

<sup>111</sup> See *supra* notes 90–92 and accompanying text.

<sup>112</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). There are several examples of courts stating that inconsistent NLRB decisions deserve less deference. E.g., *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981))); *Bath Marine Draftsmen's Ass'n v. NLRB*, 475 F.3d 14, 25 (1st Cir. 2007) (explaining that when "the Board has not been consistent in its choice of standard," "the Board is not entitled to the normal deference we owe it").



deference in fact finding.”<sup>113</sup> Of particular importance when reviewing the Board’s *Browning-Ferris* joint-employer standard, courts have found that pure agency law determinations “involve[] no special administrative expertise that a court does not possess.”<sup>114</sup> Thus, courts “do not grant great or even ‘normal[ ]’ deference” to NLRB decisions regarding employment status determinations and will only uphold the Board’s determinations if “it can be said to have ‘made a choice between two fairly conflicting views.’”<sup>115</sup> Therefore, a Board status determination, or presumptively the standard the Board applies, should not be upheld if it “overlook[s] accepted principles of the law of agency.”<sup>116</sup>

Similar to this rationale, reviewing courts might also refuse to defer to Board decisions that “rest[] on erroneous legal foundations.”<sup>117</sup> For instance, courts are less likely to defer to a Board decision if it involves a finding of law rather than of fact, as the “final word on the law—including statutory interpretation—rests with the courts.”<sup>118</sup> The *Browning-Ferris* joint-employer standard could face additional scrutiny for this reason: not only have courts determined that the Board has no special expertise as to the bounds of agency law, but determinations of agency status are also not pure questions of fact.<sup>119</sup>

In addition, courts have been reluctant to defer to an agency’s “apparent departure[]” from its own precedent unless the agency provides an adequate explanation for its decision.<sup>120</sup> The need for an explanation is particularly important when an administrative agency is “applying a multi-factor test

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<sup>113</sup> NLRB v. Allied Mech. Servs., Inc., 734 F.3d 486, 491 (6th Cir. 2013); *see also* Bob Evans Farms, Inc. v. NLRB, 163 F.3d 1012, 1019 (7th Cir. 1998).

<sup>114</sup> NLRB v. United Ins. Co. of Am., 390 U.S. 254, 260 (1968); *see also* Radio Officers’ Union v. NLRB, 347 U.S. 17, 50 (1954) (stating that determination of independent contractor status is not a “specialized field of knowledge” such that the NLRB “carr[ies] the authority of an expertness which courts do not possess and therefore must respect” (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951))).

<sup>115</sup> FedEx Home Delivery v. NLRB, 563 F.3d 492, 496 (D.C. Cir. 2009) (alteration in original) (quoting C.C. E., Inc. v. NLRB, 60 F.3d 855, 858 (D.C. Cir. 1995)).

<sup>116</sup> NLRB v. Friendly Cab Co., 512 F.3d 1090, 1096 (9th Cir. 2008) (quoting SIDA of Haw., Inc. v. NLRB, 512 F.2d 354, 357 (9th Cir. 1975)).

<sup>117</sup> Lechmere, Inc. v. NLRB, 502 U.S. 527, 539 (1992) (quoting NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956)) (refusing to give deference, even after *Chevron*, to the Board’s construction of ambiguous statutory language because it was not based on sound legal principles).

<sup>118</sup> *See, e.g., Bob Evans Farms*, 163 F.3d at 1016–17 (finding the applicability of *Chevron* deference was “by no means clear” because the NLRB’s interpretation was contrary to judicial precedent, involved a legal conclusion, and was contrary to congressional intent).

<sup>119</sup> *See, e.g., Friendly Cab Co.*, 512 F.3d at 1096–97. These questions are typically viewed as questions of fact; however, sometimes they are considered mixed questions of law and fact. For example, the court in *Friendly Cab Co.* undertook “a fact-based inquiry applying common law principles of agency” to determine cab drivers’ employment status. *See id.*

<sup>120</sup> LeMoyne-Owen Coll. v. NLRB, 357 F.3d 55, 60–61 (D.C. Cir. 2004).

through case-by-case adjudication,”<sup>121</sup> such as the Board’s *Browning-Ferris* joint-employer standard. In these cases, an agency’s explanation for its new standard has special significance—it provides courts with directions as to how the standard should be applied in different factual situations.<sup>122</sup> A broad, totality of the circumstances standard “can become simply a cloak for agency whim—or worse.”<sup>123</sup>

In summary, courts typically defer to the NLRB if the Board’s action is consistent with the *Chevron* deference doctrine.<sup>124</sup> Determining whether a Board action is deserving of *Chevron* deference is a multi-step process: the Board’s action must be within the authority delegated to it by Congress under the NLRA (Step Zero), must concern a question that the NLRA does not directly answer (Step One), and must be reasonable within the boundaries of the NLRA’s framework and ambiguity (Step Two).<sup>125</sup> If these steps are met, a reviewing court will typically defer to the Board unless the action is found to be arbitrary or capricious under the APA.<sup>126</sup> Thus, when determining if the Board is following a permissible joint-employer standard, the first step is to ascertain what guidance the NLRA provides as to the appropriate standard and the extent of any ambiguity reserved for the Board’s discretion in administering the statute.

#### IV. THE PURPOSE AND LEGISLATIVE HISTORY OF THE NLRA

The NLRA does not explicitly define “joint employer” or otherwise provide direct insight as to the controlling standard to be used when determining if such a relationship exists. However, an examination of the purposes of the NLRA, and Congress’s direction as to the appropriate standard for determining when an employer–employee relationship exists, provide informative guidance as to the scope of authority delegated to the NLRB in determining its joint-employer standard.

The NLRA’s “unique purpose” is “to preserve the balance of power between labor and management”<sup>127</sup> and to “encourag[e] and protect[] the

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<sup>121</sup> *Id.* at 61.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* Apparently, Justice Roberts agrees that an agency’s inadequate explanation for a departure from its own precedent may be reason for courts to refuse to defer to the agency’s decision, or at least he did during his tenure as a circuit court judge when he drafted this opinion. *See id.*

<sup>124</sup> *See supra* note 81 and accompanying text.

<sup>125</sup> *See supra* Part III.A.

<sup>126</sup> *See supra* notes 102–08 and accompanying text.

<sup>127</sup> *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2445 n.7 (2013); *see also* *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 573 (1994) (explaining that Congress amended the NLRA to exclude supervisors in order to address the “imbalance between labor and management”). The NLRA’s Declaration of Policy is contained in 29 U.S.C. § 151 (2012).

collective-bargaining process.”<sup>128</sup> By uniting and engaging in collective bargaining, workers are provided the opportunity to participate in meaningful negotiations over their terms and conditions of employment “with the parties who are the primary beneficiaries of their work”<sup>129</sup>—namely, their employers.<sup>130</sup> In other words, the purpose of the NLRA is to encourage collective bargaining between workers and any capital provider enjoying direct or indirect control over the workers’ employment conditions.<sup>131</sup>

The 1947 Taft–Hartley amendments to the NLRA clarified the Act’s definition of employment relationships and the applicable standard for determining when such a relationship exists under the Act. The Taft–Hartley amendments were introduced, in part, in response to the Supreme Court’s decision in *NLRB v. Hearst Publications, Inc.*, which upheld the NLRB’s expansive interpretation of the word “employee.”<sup>132</sup>

According to the Court in *Hearst*, whether an employment relationship existed was to be determined under what is now referred to as the “economic realities test.” Under this test, employment relationships were to be determined broadly, assessing the “underlying economic facts” of the employment relationship.<sup>133</sup> The Court rationalized that “[w]here all the conditions of the relation require protection, protection ought to be given.”<sup>134</sup> Employee status was to be determined “primarily from the history, terms and purposes of the [NLRA],” instead of “technically and exclusively by previously established legal classifications,” such as the common law of agency.<sup>135</sup> Finally, the *Hearst* economic realities standard seemed to offer almost blind deference to NLRB determinations of employee–employer status.<sup>136</sup> The Court found that this duty belonged to the Board rather than the courts because of the Board’s expertise regarding “the abilities and needs of the workers for self-organization and collective action.”<sup>137</sup>

Congressional response to the *Hearst* interpretation of “employee” was swift and “adverse.”<sup>138</sup> The Taft–Hartley amendments were enacted three years later and specifically excluded independent contractors from the

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<sup>128</sup> *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 91 (1995) (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984)).

<sup>129</sup> Harper, *supra* note 9, at 331 (explaining that the purpose of the NLRA is to encourage collective bargaining between workers and those parties with “the potential interest and . . . ability to offer enhanced wages” to the workers).

<sup>130</sup> See 29 U.S.C. § 152(2)–(3).

<sup>131</sup> See Harper, *supra* note 9, at 331–33.

<sup>132</sup> *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 129 (1944), *overruled in part by* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* (quoting *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 552 (2d Cir. 1914)).

<sup>135</sup> *Id.* at 124, 129.

<sup>136</sup> *Id.* at 130.

<sup>137</sup> *Id.*

<sup>138</sup> *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968).

NLRA's coverage.<sup>139</sup> Congress's clear intent in enacting the Taft-Hartley amendments was to limit, but not abrogate, the NLRB's authority to set the applicable standards for determining employment relationships: "It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished."<sup>140</sup> The purpose and legislative history of the Taft-Hartley amendments, as well as the Supreme Court's subsequent precedent, establish that Congress intended the NLRB apply common law principles of agency when determining employer and joint-employer status.<sup>141</sup>

Because finding an employment relationship is central to determining whether a joint-employment relationship exists, it follows that the joint-employer standard must likewise be consistent with common law principles of agency. Thus, courts should accord the *Browning-Ferris* joint-employer standard deference if it is reasonably consistent with the common law of agency.<sup>142</sup>

#### V. COURTS SHOULD DEFER TO THE *BROWNING-FERRIS* JOINT-EMPLOYER STANDARD

As established in the previous parts, the text of 29 U.S.C. § 156,<sup>143</sup> the NLRA's legislative history,<sup>144</sup> and the NLRA's stated purpose in 29 U.S.C. § 151 all establish that Congress clearly intended to delegate to the NLRB the authority to determine and adjust the joint-employer relationship necessary to justify collective-bargaining requirements, as long as the standard provided was consistent with the common law of agency.<sup>145</sup> Thus, reviewing courts should defer to the NLRB's *Browning-Ferris* joint-employer standard because

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<sup>139</sup> Labor Management Relations (Taft-Hartley) Act, ch. 120, sec. 101, § 2(3), 61 Stat. 136, 137-38 (1947) (codified as amended at 29 U.S.C. § 152(3) (2012)); *see also United Ins. Co. of Am.*, 390 U.S. at 256.

<sup>140</sup> H.R. REP. NO. 80-245, at 18 (1947).

<sup>141</sup> *See, e.g., Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989) ("[W]e have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."); *United Ins. Co. of Am.*, 390 U.S. at 256 ("The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act.").

<sup>142</sup> The current definitions of "employee" and "employer" are found in 29 U.S.C. § 152. "Employer" is defined broadly and vaguely as "any person acting as an agent of an employer, directly or indirectly," and the statute articulates several excluded employers, including public employers. *Id.* § 152(2). "Employee" is defined to include "any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, . . . but shall not include . . . any individual having the status of an independent contractor." *Id.* § 152(3).

<sup>143</sup> *See supra* note 106 and accompanying text.

<sup>144</sup> *See supra* Part IV.

<sup>145</sup> *See supra* Part IV.

(1) the standard is permissible under traditional agency principles, (2) the standard is not an attempt to reinstate the *Hearst* economic realities test, and (3) the new standard is justified by developments in the American economy and will not necessarily result in any unjustified or dramatic economic ramifications.<sup>146</sup>

*A. The Browning-Ferris Joint-Employer Standard Is Reasonably Consistent with Common Law Principles of Agency*

Although it is clear that Congress delegated to the NLRB the authority to adjust the standard for determining whether joint-employer relationships exist, it is also clear that Congress did not delegate to the Board *unlimited* authority.<sup>147</sup> As stated, the legislative history of the Taft–Hartley amendments establishes that Congress intended that the Board apply common law principles of agency in determining whether employment relationships exist.<sup>148</sup> Because the NLRA is not ambiguous as to the standard Congress intended the Board to apply,<sup>149</sup> reviewing courts should only defer to the Board’s *Browning-Ferris* standard if it is reasonably consistent with common law principles of agency.<sup>150</sup>

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<sup>146</sup> Some circuits, such as the D.C. Circuit, have held that the NLRB’s standard for determining employment relationships is not entitled to *Chevron* deference because it is well-settled that common law principles of agency *must* guide the Board’s status determinations. *FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1127–28 (D.C. Cir. 2017). This Note does not dispute that the NLRB must follow common law principles of agency. See *supra* note 141 and accompanying text. Rather, this Note argues that the common law itself is ambiguous and leaves the NLRB some room as to how the standard is applied. See *infra* Part V.A.1. This is supported by the fact that both the Supreme Court and NLRB have understood and applied the common law of agency differently across time. See *FedEx Home Delivery*, 849 F.3d at 1124–27.

<sup>147</sup> See *supra* notes 140–41 and accompanying text.

<sup>148</sup> See *supra* notes 140–41 and accompanying text.

<sup>149</sup> See *supra* note 141.

<sup>150</sup> Because Congress clearly delegated the Board the authority to shape the rules and regulations as necessary to carry out the NLRA, such as who qualifies as an “employer” or “joint employer” under the Act, *Browning-Ferris*’s well-explained change in standard survives *Chevron* Step Zero. See 29 U.S.C. § 156 (2012); *United States v. Mead Corp.*, 533 U.S. 218, 227–31 (2001). The *Browning-Ferris* decision also survives Step One of the *Chevron* model because although the statute is not ambiguous about the fact that the NLRB’s joint-employer standard must be consistent with the common law of agency, the common law standard is ambiguous as to the precise question at issue—the exact parameter of control a putative employer must possess or exercise in order to establish a common law employment relationship. See *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 92–94 (1995). Thus, the question that remains is whether the *Browning-Ferris* standard survives the final step of *Chevron*—whether finding an employment relationship based on the unexercised right to control is consistent with the common law of agency—and whether this standard is “arbitrary or capricious.” See *supra* note 102 and accompanying text. The decision would be arbitrary and capricious if the NLRB considered factors Congress had not intended it to consider, such as the *Hearst* economic

*1. The Second and Third Restatements of Agency Permit Finding an Employment Relationship When a Putative Employer Possesses Only Indirect or Unexercised Control over Workers*

The Supreme Court has seemingly accepted the Second Restatement of Agency as expressing the general common law of agency.<sup>151</sup> Thus, in order for reviewing courts to afford *Chevron* deference to the NLRB's *Browning-Ferris* joint-employer standard, the Board's new standard must be reasonably consistent with the Second Restatement's standard for assessing employment relationships.

The Second Restatement of Agency was adopted in 1958 for the purpose "of keeping the statements of law current with the growth of [court] decisions in each subject."<sup>152</sup> Although the Second Restatement does not have a section explicitly defining the standard for determining employee–employer relationships, section 220 defines the factors that should be considered when determining master–servant relationships.<sup>153</sup> A servant is defined as a person employed by another who is subject to the other entity's control *or right to control* over the servant's performance of his or her duties.<sup>154</sup> Comment (d) of

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realities test. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983).

<sup>151</sup> *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989); *see also* Michael C. Harper, *Fashioning a General Common Law for Employment in an Age of Statutes*, 100 CORNELL L. REV. 1281, 1291–94 (2015).

<sup>152</sup> RESTATEMENT (SECOND) OF AGENCY intro. (AM. LAW INST. 1958).

<sup>153</sup> *Id.* § 220(2). In determining whether a putative employee actually shares an employment relationship with a putative employer, or is merely an independent contractor who is exempt from coverage under the NLRA, the following "matters of fact" are to be considered:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

*Id.*

<sup>154</sup> *Id.* § 220(1) (emphasis added).

section 220 further describes the requisite control an employing entity must possess in order to be considered a “master” or, in layman’s terms, an employer: “Although control or right to control . . . is important and in many situations is determinative, . . . [it] may be very attenuated.”<sup>155</sup> In some instances, an employment relationship may still exist even if there is “an understanding that the employer *shall not* exercise control.”<sup>156</sup> In summary, under section 220 of the Second Restatement, a master–servant relationship may still exist even if a putative employer’s right to control is removed or the putative employer has specifically agreed not to actually exercise any control over the employees at issue. An employment relationship may still be found as long as the putative employer’s right to control is over the manner and means by which the employees complete their services, rather than simply the results of their services.<sup>157</sup>

This understanding of the common law of agency is also consistent with the Third Restatement’s updated description of employee–employer relationships. The Third Restatement was adopted in 2006 to account for developments in the law of agency that occurred during the fifty-plus years after the Second Restatement’s publication.<sup>158</sup> In the introduction of the Third Restatement, the editors noted that the common law of agency has “retained structural coherence” since the Second Restatement’s publication.<sup>159</sup>

The Third Restatement of Agency retains a definition of “employee” in section 7.07(3) that is comparable to the Second Restatement: “[A]n employee is an agent whose principal controls *or has the right to control* the manner and means of the agent’s performance of work.”<sup>160</sup> Similarly, the Third

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<sup>155</sup> *Id.* § 220(1) cmt. d.

<sup>156</sup> *Id.* (emphasis added). As an example, a full-time cook may be considered an employee even if the employer agrees that it will exercise no control over the menu or cooking decisions. *Id.*

<sup>157</sup> *Id.* § 220(1) cmt. e (“An agent who is not subject to control as to the manner in which he performs the acts that constitute the execution of his agency is in a similar relation to the principal as to such conduct as one who agrees only to accomplish mere physical results. For the purpose of determining liability, they are both ‘independent contractors’ . . .”).

<sup>158</sup> RESTATEMENT (THIRD) OF AGENCY foreword (AM. LAW INST. 2006). In publishing the Third Restatement of Agency, the editors aimed to “restate the law of Agency in the context of important statutes that influence court-made law, are influenced by the common law of agency, and are interpreted in light of common-law doctrine.” *Id.*

<sup>159</sup> *Id.* intro.

<sup>160</sup> *Id.* § 7.07(3) (emphasis added). The factors a court should consider in determining whether an employee–employer relationship exists, or whether the putative employee is merely an independent contractor, are described in comment (f):

[T]he extent of control that the agent and the principal have agreed the principal may exercise over details of the work; whether the agent is engaged in a distinct occupation or business; whether the type of work done by the agent is customarily done under a principal’s direction or without supervision; the skill required in the agent’s occupation; whether the agent or the principal supplies the tools and other

Restatement also explains that “[i]n some employment relationships, an employer’s right of control may be attenuated . . . . Nonetheless, all employers retain a right of control, however infrequently exercised.”<sup>161</sup>

The explicit language of the Second and Third Restatements establishes that a putative employer’s exercised control, as well as the *potential* to exercise control, over a group of employees can establish an employee–employer relationship.<sup>162</sup> Although the NLRB may not have recognized more attenuated, indirect employment relationships under its prior standard, that does not in itself render the *Browning-Ferris* joint-employer standard an unlawful exercise of agency discretion.<sup>163</sup> The control required to qualify as a joint employer under the *Browning-Ferris* standard is still consistent with the common law of agency articulated by both the Second and Third Restatements.

As for the Second Restatement, comment (d) of section 220 seems to specifically address arrangements in which the putative employer, or putative joint employer, retains only unexercised, contractual authority over an employee.<sup>164</sup> Comment (d) contemplates an even further removed employment relationship than those recognized under the *Browning-Ferris* standard. It permits recognizing an employment relationship even if there was an explicit understanding between parties that a putative employer *shall not* exercise any

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instrumentalities required for the work and the place in which to perform it; the length of time during which the agent is engaged by a principal; whether the agent is paid by the job or by the time worked; whether the agent’s work is part of the principal’s regular business; whether the principal and the agent believe that they are creating an employment relationship; and whether the principal is or is not in business. Also relevant is the extent of control that the principal has exercised in practice over the details of the agent’s work.

*Id.* § 7.07 cmt. f.

<sup>161</sup> *Id.* This comment also explicitly states that “[i]f a person has no right to control an actor *and* exercises no control over the actor, the actor is not an agent,” implying that a putative employer need not actually exercise any control in order to qualify as an employer. *Id.* (emphasis added).

<sup>162</sup> See *supra* Part V.A.

<sup>163</sup> See Harper, *supra* note 9, at 335–36 (“Admittedly, the common law right-to-control test need not be so rigidly applied. Although a number of lower courts have resisted any tendencies of the Board to look beyond the alleged employer’s direct control over the ‘manner and means’ of the work and consider other factors that are more concerned with the actual economic position of the workers, the Supreme Court has suggested that the common law test is flexible and requires consideration of all factors of the workers’ relationship with the alleged employer.” (footnote omitted)). For further illustration that the common law test allows more flexibility in finding an employment relationship than what the NLRB’s previous thirty-year-old joint-employer standard allowed under *TLI, Inc.*, 271 N.L.R.B. 798, 798 (1984), and *Laerco Transportation*, 269 N.L.R.B. 324, 325 (1984), see *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258–60 (1968).

<sup>164</sup> See RESTATEMENT (SECOND) OF AGENCY § 220(1) cmt. d (AM. LAW INST. 1958).



control over the putative employees.<sup>165</sup> Although the “however infrequently exercised” language of comment (f) of section 7.07 of the Third Restatement could be read to imply that the right to control still must be actually exercised at some point, this reading would be inconsistent with the surrounding language of the Third Restatement.<sup>166</sup> Comment (f) also states that the right to control “may be attenuated,” and seems to focus more on the existence of the *right* to control rather than its exercise.<sup>167</sup> Although the extent of control that a putative employer has exercised over a set of employees has probative value in determining whether an employment relationship exists,<sup>168</sup> neither the Second nor Third Restatement of Agency indicate that the putative employer *must* exercise direct and immediate control over the employees to qualify as their employer. This conclusion is especially compelling considering that the Third Restatement was printed in 2006, within the timeframe in which the NLRB was following its “direct and immediate control” standard.<sup>169</sup> Thus, although the NLRB elected to apply a narrower joint-employer standard at that time, the Third Restatement acknowledged that the common law of agency could reach a wider span of relationships.

## 2. A Broad, Flexible Understanding of the Common Law Is Consistent with the Purposes of the NLRA

Although not dispositive, courts should also give weight to the fact that the NLRB’s new joint-employer standard is not only consistent with the common law of agency, but is also more aligned with the NLRA’s general purposes than the Board’s prior standard.<sup>170</sup> As the majority in *Browning-Ferris* explained, its goal in shifting the joint-employer standard was to encourage fair bargaining and to ensure that strategic business models do not unnecessarily distort differences in power between employees and employers.<sup>171</sup> Many of these strategic business models are arguably developed by businesses with the specific intent of avoiding collective-bargaining

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<sup>165</sup> *Id.* (“Although control *or right to control* . . . is important and in many situations is determinative, . . . [it] may be very attenuated. . . . In some types of cases which involve persons customarily considered as servants, there may even be an understanding that the employer shall not exercise control.” (emphasis added)).

<sup>166</sup> RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. f.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* (“Also *relevant* is the extent of control that the principal has exercised in practice over the details of the agent’s work.” (emphasis added)). The language indicates that the extent of a putative employer’s exercise of control is merely one of many factors considered under the common law standard. *See id.*

<sup>169</sup> *See supra* notes 43–44 and accompanying text.

<sup>170</sup> *See NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 91 (1995) (recognizing the consistency of the NLRB’s interpretation of “employee” with the NLRA’s purposes as a factor in finding the interpretation permissible under the NLRA).

<sup>171</sup> *See supra* notes 51–57 and accompanying text.

obligations under the NLRA.<sup>172</sup> Congress explicitly delegated to the Board the authority to fashion rules addressing developing issues in labor law based on the Board's greater expertise compared to courts regarding employment relationship issues, and to do so in a manner consistent with the purposes of the NLRA.<sup>173</sup> Thus, it seems appropriate that the Board would be entitled to deference in adjusting its rules in an area of labor law, such as determining employer or joint-employer status, in which the broad and flexible language of the NLRA and the common law of agency are already susceptible to misuse and inconsistent application.<sup>174</sup>

Considering the congressional purposes in enacting the NLRA and in establishing the NLRB to regulate collective-bargaining relationships, along with the language of the Second and Third Restatements, the *Browning-Ferris* joint-employer standard falls safely within the bounds of the common law of agency and the Board's legitimate rulemaking authority.<sup>175</sup> The *Browning-Ferris* majority provided a thorough, twenty-page analysis of why they believed it was appropriate and necessary for the Board to revise its joint-employer standard.<sup>176</sup> Although the *Browning-Ferris* standard is a departure from the Board's precedent, it is a far stretch to describe the departure as unexplained. Therefore, the Board's revised joint-employer standard is reasonable, and reviewing courts should afford it *Chevron* deference.

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<sup>172</sup>Ruth Burdick, *Principles of Agency Permit the NLRB to Consider Additional Factors of Entrepreneurial Independence and the Relative Dependence of Employees When Determining Independent Contractor Status Under Section 2(3)*, 15 HOFSTRA LAB. & EMP. L.J. 75, 79 (1997) ("Employers have strong economic incentives to classify workers as independent contractors because the definition relieves them of statutory obligations to contribute to Social Security, unemployment insurance, workers' compensation, income tax withholding, and employee benefits.").

<sup>173</sup>See *supra* notes 106–09 and accompanying text.

<sup>174</sup>Harper, *supra* note 9, at 337 ("The very flexibility of the [common law] approach, as reflected in the range of factors that it encompasses, makes it either unpredictable for both employers and unions or manipulable by employers who can control most of the factors without changing basic economic relationships, or both."). Considering the flexibility allowed under the common law standard with the unfortunate trend of employer foul play, the NLRB's new, more employee-friendly standard sensibly and permissibly reforms the joint-employer standard to be more consistent with the purposes of the Act. *Id.*

<sup>175</sup>See 29 U.S.C. § 156 (2012).

<sup>176</sup>*Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. No. 186, 2015 WL 5047768, at \*1–2, \*15–21 (Aug. 27, 2015). As a quick summary, the Board provided the following justifications for its decision to revisit its joint-employer standard: an aim to "put the Board's joint-employer standard on a clearer and stronger analytical foundation," to better "serve the [NLRA's] policy of 'encouraging the practice and procedure of collective bargaining,'" and to address shortcomings in the Board's prior requirement of "direct and immediate" control, which unnecessarily narrowed the circumstances under which an employment relationship could be found in many contingent employment arrangements. *Id.* at \*2, \*18 (quoting 29 U.S.C. § 151).

*B. The Browning-Ferris Joint-Employer Standard Is Different than the Economic Realities Test*

Both the legislative history of the Taft–Hartley amendments and subsequent Supreme Court precedent are interpreted as rejecting the *Hearst* economic realities standard as appropriate for determining whether an employment relationship exists under the NLRA.<sup>177</sup> As previously described, the Court has held that the “obvious purpose” of the Taft–Hartley amendments was to ensure that the Board applied traditional common law principles of agency when determining whether employment relationships exist, rather than the economic realities test, which is primarily driven by policy and economic considerations.<sup>178</sup> The Court’s extreme deference to the NLRB in *Hearst*, without any articulated limits, seems to have been a significant motivating factor behind Congress’s decision to reject the *Hearst* economic realities standard.<sup>179</sup> Several opponents of the *Browning-Ferris* joint-employer standard contend that the new standard is an ill-disguised attempt to reinstate the rejected *Hearst* economic realities standard.<sup>180</sup>

Some scholars maintain that there are actually two economic realities tests. Although Congress rejected the *Hearst* economic realities test when the economic relationship of the involved parties was a controlling and separate consideration from the control test, these scholars argue that an economic realities test that is incorporated *as part of* the control test is still permissible under the common law of agency.<sup>181</sup> In *Hearst*, the economic reality of the

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<sup>177</sup> See *supra* Part IV (discussing the reasoning behind, and the impact of, the Taft–Hartley amendments to the NLRA).

<sup>178</sup> NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968); see also *supra* Part IV.

<sup>179</sup> H.R. REP. NO. 80-245, at 18 (1947) (“It is inconceivable that Congress, when it passed the act, authorized the [NLRB] to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words, not far-fetched meanings but ordinary meanings.”). In a report released the same year as the Taft–Hartley amendments, Congress described the previous *Hearst* Court’s reliance on the NLRB’s expertise as “misplaced.” *Id.*

<sup>180</sup> *Browning-Ferris*, 2015 WL 5047768, pt. III.A (Members Miscimarra & Johnson, dissenting) (“Accordingly, the inescapable conclusion to be drawn from the Taft-Hartley legislation repudiating the *Hearst* opinion is that Congress must have intended that common-law agency principles, rather than the majority’s much more expansive policy-based economic realities and statutory purpose approach, here govern the definition of employer as well as employee under the Act.”); see also Ivan Osorio, *NLRB’s BFI Decision Deserves Overturning*, COMPETITIVE ENTERPRISE INST. (Sept. 9, 2015), <https://cei.org/blog/nlrbs-bfi-decision-deserves-overturning?page=1> [<https://perma.cc/2CU8-JC5N>] (“[T]he majority appears to be reviving an old joint employer standard set in the 1944 Supreme Court decision *NLRB v. Hearst Publications* that has since been rejected by Congress.”).

<sup>181</sup> See, e.g., Thomas M. Murray, Note, *Independent Contractor or Employee? Misplaced Reliance on Actual Control Has Disenfranchised Artistic Workers Under the National Labor Relations Act*, 16 CARDOZO ARTS & ENT. L.J. 303, 337–38 (1998). In his note, Murray describes how in both *United States v. Silk*, 331 U.S. 704, 712 (1947), and

employment relationship was the *determinative* factor, and the opinion explicitly stated that an employment relationship could be found under this standard *even if* such a finding was precluded under the common law standard.<sup>182</sup> It was this divergent and far-reaching view of the employment relationship that Congress explicitly rejected through the Taft–Hartley amendments, not a narrower standard that considers economic realities but is still controlled by the common law of agency.<sup>183</sup> Allowing *some* consideration of the economic realities of an employment relationship *within* the control test is consistent with both the factors identified as appropriate for consideration under the common law of agency as well as the NLRA’s broad definition of employer.<sup>184</sup> This understanding of the Taft–Hartley amendments also allows the Board an appropriate level of flexibility to adjust its employer and joint-employer standards to meet current legal and economic demands, as Congress predicted the Board would need when originally delegating its rulemaking authority.<sup>185</sup>

Thus, although it can be argued that the *Browning-Ferris* joint-employer standard may tangentially consider the economic reality of the relationship between a putative joint employer and the employees at issue in determining whether a joint-employment relationship exists, this does not necessarily render the standard an unlawful exercise of agency discretion. As demonstrated by the Board’s application of the standard, a putative employer’s indirect or unexercised right to control employees is but one consideration in

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*Bartels v. Birmingham*, 332 U.S. 126, 130 (1947), the Supreme Court stressed “that overall economic realities *must* be examined in determining employee status.” *Id.* (emphasis added). Although these cases did not directly involve the NLRA, they were decided just ten days after *Hearst* and Congress believed them, at the time, to be consistent with the common law of agency. *See id.* at 313–16, 313 n.64; *see also* S. REP. NO. 80-1255, at 2 (1948). As Murray explains, subsequent NLRB and circuit court decisions misinterpreted Congress’ intent in enacting the Taft–Hartley amendments and, therefore, applied the common law of agency control test in an overly narrow manner. *Murray, supra*, at 337–38. In enacting the Taft–Hartley amendments, “Congress said, ‘[d]on’t be fooled or unduly influenced by the form of the arrangement to which you must apply’ the control test.” *Id.* at 337 (alteration in original) (quoting S. REP. NO. 80-1255, at 17). Thus, under this view, although the economic realities of the relationship between an employee and a putative employer should not be given dispositive weight under the common law of agency, it may, and should, be one factor considered. *See id.* at 337–38.

<sup>182</sup> *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 127–29 (1944), *overruled in part by* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

<sup>183</sup> *See* discussion *supra* note 181.

<sup>184</sup> *See* 29 U.S.C. § 152(2)–(3) (2012) (outlining the NLRA’s broad and open definitions of “employer” and “employee”); *see also* *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995). For a discussion of the factors of an employment relationship considered under the common law of agency, *see supra* Part V.A.1.

<sup>185</sup> *See* 29 U.S.C. § 156; *Am. Trucking Ass’n v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967) (“Regulatory agencies . . . are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation’s needs in a volatile, changing economy.”).

determining whether an employment relationship exists—it is not a sole or determinative factor.<sup>186</sup>

*C. The Browning-Ferris Standard Involves a Case-by-Case Analysis that Will Not Necessarily Result in Any Dramatic or Unjustified Economic Implications*

Joint-employer status determinations are an individualized, fact-specific inquiry into the totality of the relationships between a putative joint employer, its putative employees, and the employees' direct employer.<sup>187</sup> Both the Board's prior joint-employer standard and its new standard require a multifactor test under which no one factor is determinative.<sup>188</sup> The question is simply whether a putative joint employer maintains adequate control over the terms and conditions of a set of workers' employment to make the entity's presence at the bargaining table necessary to ensure meaningful bargaining between the interested parties.<sup>189</sup>

Although the *Browning-Ferris* joint-employer standard can fairly be described as more expansive than its predecessor, there is currently little basis for many of the concerns about the decision's potentially vast and overreaching economic implications. To date, the NLRB and its administrative judges seem to be applying the standard in a controlled and reasonable manner that is consistent with the common law of agency and the purposes of the NLRA.<sup>190</sup>

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<sup>186</sup> *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. No. 186, 2015 WL 5047768, at \*18–21 (Aug. 27, 2015). In fact, in applying the test, the Board actually found that BFI *had* exercised control over the employees at issue of several occasions. *Id.* at \*22 (“In many relevant respects, [BFI’s] right to control is indisputable. Moreover, it has exercised that control, both directly and indirectly.”). Thus, although the new standard could be interpreted in a manner that greatly expands the circumstances under which an employment relationship may be found, it need not be.

<sup>187</sup> *See, e.g., Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964) (discussing how determining if a putative employer “possesse[s] sufficient indicia of control to be an ‘employer’ is essentially a factual issue”); *Carrier Corp. v. NLRB*, 768 F.2d 778, 781 n.1 (6th Cir. 1985) (“[B]ecause the joint employer issue is simply a factual determination, a slight difference between two cases might tilt a case toward a finding of a joint employment.”). Interestingly, in 1980 the Fifth Circuit explicitly stated that the existence of a joint-employer relationship is a factual issue that “depends on the control which one employer exercises, or *potentially exercises*, over the labor relations policy of the other.” *N. Am. Soccer League v. NLRB*, 613 F.2d 1379, 1381–82 (5th Cir. 1980) (emphasis added).

<sup>188</sup> *See supra* Parts II, V.A.1.

<sup>189</sup> *See Browning-Ferris*, 2015 WL 5047768, at \*16 (“To best promote this policy, our joint-employer standard—to the extent permitted by the common law—should encompass the full range of employment relationships wherein meaningful collective bargaining is, in fact, possible.”).

<sup>190</sup> *See generally, e.g., Campaign for the Restoration and Regulation of Hemp*, No. 19-CA-143377, 2015 WL 9256882 (N.L.R.B. Div. of Judges Dec. 17, 2015) (adopting a cease

Because the joint-employer standard is individualized and fact-specific, and because the Board has not had the opportunity to clarify the true breadth of its new standard, its actual impact is still unclear. Many of the business models that will be impacted by this development in labor law are those that have been improperly constructed for the purpose of avoiding collective bargaining and other obligations under the NLRA.<sup>191</sup> It is unlikely that requiring these employers to participate in the collective-bargaining process with the workers from whom they reap a profit will greatly threaten the economic stability of the companies or of society.<sup>192</sup> Rather, these enhanced obligations would be more faithful to the purposes of the NLRA and the redistributive goals of collective bargaining.<sup>193</sup>

Therefore, reviewing courts should accord *Chevron* deference to the NLRB's *Browning-Ferris* joint-employer standard. In applying the new standard, the Board will likely avoid any unnecessary or improper large-scale economic impacts without judicial intervention, while still promoting collective bargaining between workers and those having the requisite influence over the terms and conditions of their employment. The outcome suggested by this Note is not groundbreaking. It would be per-the-usual for appellate courts to defer to the Board's judgment on this labor law matter, as has been the result in the vast majority of Board cases that have come under appellate court review in the past half century.<sup>194</sup>

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and desist order). In this case, the NLRB administrative law judge found a joint-employer relationship existed because the two entities "share[d] or codetermine[d] those matters governing the essential terms and conditions of employment." *Id.* (quoting *Browning-Ferris*, 2015 WL 5047768, at \*13). Here, as will be true in many cases, the NLRB judge did not need to address whether the putative joint employer's indirect or unexercised authority to control workers was significant enough to qualify as an employer because the putative employer possessed, and had exercised, direct control over the workers. *See id.* In fact, the putative joint employer's control over the workers was so substantial in this case that the NLRB judge found that the three joint employers at issue were really one, sole employer. *Id.*

<sup>191</sup> *See* Harper, *supra* note 9, at 333 (discussing how experience demonstrates that employers "will look for any available routes to escape collective bargaining obligations that threaten the maximization of profits," even routes that "clearly upset" the NLRA's redistributive goals).

<sup>192</sup> *See id.*

<sup>193</sup> *See id.* at 331 ("The NLRA, therefore, was framed to allow workers to join together in an attempt to increase their wages through collective bargaining with the parties who are the primary beneficiaries of their work, namely the providers of the capital that their labor helps make productive. Only such capital providers have both the potential interest and the potential ability to offer enhanced wages." (footnote omitted)).

<sup>194</sup> *Appellate Court Decisions, 1974-2016*, NLRB, <https://www.nlrb.gov/news-outreach/graphs-data/litigations/appellate-court-decisions-1974-2016> [<https://perma.cc/7T7S-NN7E>] (providing data regarding the number of NLRB cases appellate courts have heard, enforced in full, enforced with modifications or partially remanded, and total losses from 1974 through 2016).

## VI. CONCLUSION

In August 2015, the NLRB expanded the circumstances under which an entity may qualify as a joint employer under the NLRA, departing from its thirty-year-old precedent requiring that a joint employer actually exercise direct and substantial control over its employees. In *Browning-Ferris*, the Board broadened its joint-employer standard to include those entities having significant but indirect or unexercised control over workers.<sup>195</sup> The shift was motivated by the Board's concern that the old standard unwarrantedly allowed companies to shield themselves from the NLRA's collective-bargaining obligations through calculated business practices, exposing many workers to job and wage insecurity.<sup>196</sup> The Board's new standard requires that all parties suitable for meaningful negotiations over the terms and conditions of workers' employment be represented at the collective-bargaining table.<sup>197</sup>

The Board's sudden departure from its own well-established precedent has raised concerns that businesses might be exposed to unexpected liability and obligations under the NLRA, resulting in unnecessary and unplanned expenses.<sup>198</sup> Critics have also contended that because the business community has planned according to, and developed with, the old joint-employer standard, the new standard might significantly and adversely impact franchisee and supplier firm business models.<sup>199</sup> Because of the increasing prominence of these business models, there is likewise apprehension about the impact this new standard might have on the economy as a whole.<sup>200</sup>

However, although the *Browning-Ferris* decision expanded the circumstances under which a joint-employer relationship can be found, it did so within the permissible bounds of the authority that Congress has delegated to the NLRB. Congress has commanded that the Board determine joint-employer status under standards consistent with the common law of agency.<sup>201</sup> Although admittedly broader than its prior standard, the Board's new standard is still consistent with the common law of agency as articulated in both the Second and Third Restatements of Agency. The Board's new standard also faithfully furthers the purposes of the NLRA: encouraging meaningful collective bargaining between workers and those entities making decisions about the terms and conditions of their employment.

Therefore, under traditional standards of judicial review, courts should defer to the NLRB's experience and expertise as expressed in the *Browning-Ferris* joint-employer standard. The standard is consistent with both the Board's rulemaking authority under the NLRA as well as the common law of

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<sup>195</sup> See *supra* Part II.B.

<sup>196</sup> See *supra* notes 51–54 and accompanying text.

<sup>197</sup> See *supra* notes 56–57 and accompanying text.

<sup>198</sup> See *supra* notes 20–23 and accompanying text.

<sup>199</sup> See *supra* note 78 and accompanying text.

<sup>200</sup> See *supra* notes 20–23 and accompanying text.

<sup>201</sup> See *supra* note 141 and accompanying text.

agency. If the Board's new joint-employer standard has any unwanted or adverse consequences, it remains within Congress's province, not the courts', to adjust the NLRA to reflect its desired standard or otherwise limit the NLRB's rulemaking authority.<sup>202</sup>

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<sup>202</sup> Such a bill was proposed soon after the *Browning-Ferris* decision. Protecting Local Business Opportunity Act, H.R. 3459, 114th Cong. (2015).